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No. 98-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID M. DALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 16, 1998

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Questions Presented for Review

1. In a federal criminal prosecution tried to a jury, does the failure to submit an essential element of the crime for jury determination, in violation of this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995), constitute "actual prejudice" per se under the cause-and-prejudice doctrine enunciated by *United States v. Frady*, 456 U.S. 152 (1981), as applied to a motion under 28 U.S.C. § 2255?

2. Should the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) be confined to its original context of state prisoner petitions only?

List of Parties

The proceeding below was a motion by Petitioner David M. Dale under 28 U.S.C. § 2255, in which the only other party was the United States. In the original federal criminal prosecution, the defendants were:

(1) David M. Dale, the Petitioner herein;

(2) Michelle Ashton;

(3) Martin Segal;

(4) Automated Data Management, Inc.; and

(5) Terence Sweeney.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

DAVID M. DALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner David M. Dale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The majority and concurring opinions of the court of appeals upon the rendering of its judgment on the present 28 U.S.C. § 2255 motion (a1-13)[1] are reported at 140 F.3d 1054 (D.C. Cir. 1998). The district court's opinion (a14-22) is unreported.

Previous opinions by the district court and the court of appeals in the course of the original prosecution and direct appeal are reported at 782 F. Supp. 615 (D.D.C. 1991) and 991 F.2d 819 (D.C. Cir.), *cert. denied,* 510 U.S. 1030 (1993).

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[1] Citations to "a-" are to pages of the appendix to this petition. Citations to "A-" are to pages of the Appendix in the court of appeals.

Jurisdiction

The court of appeals' opinion was issued on April 14, 1998 (a1). An order denying rehearing was entered on June 18, 1998 (a23). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statute Involved

The questions presented involve the construction and application of 28 U.S. C. § 2255, as in effect prior to its amendment in 1996, which provides as follows:

"28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new

trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief by the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

'An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Statement of the Case

This case presents this Court with an appropriate vehicle for determining what—if anything—remains of a citizen's right to seek collateral relief from federal conviction and punishment imposed unlawfully, and in the absence of a constitutionally valid adjudication of guilt by jury verdict, where the legal ground for attack rests upon a decision by this Court handed down after direct appeal has been exhausted but while the defendant remains in federal custody.

In this case, it is uncontested that the Petitioner was unconstitutionally convicted and sentenced on several counts of violating 18 U.S.C. § 1001 in the absence of any jury verdict on the

essential element of materiality, and in fact by a directed verdict for the government on that element, based upon a pretrial ruling by the district court that materiality was satisfied as a matter of law. This was precisely the error later held by this Court in *United States v. Gaudin*, 515 U.S. 506 (1995), to violate the Fifth and Sixth Amendments to the Constitution by depriving a defendant of his right to a jury determination of guilt.

Nevertheless, upon the Petitioner's motion for relief under 28 U.S.C. § 2255, the lower courts in this case have found themselves unable to correct that error. The district court ruled that the application of *Gaudin* was barred by the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), as extended to federal prisoners. On appeal, a majority of the court of appeals applied *Gaudin*, but also denied relief on the alternative ground that the *Gaudin* error did not produce "actual prejudice" within the meaning of *United States v. Frady*, 456 U.S. 152 (1981), as now construed by the court of appeals to incorporate all four parts of the "plain error" test set forth by this Court's decisions in *United States v. Olano*, 507 U.S. 725 (1993), and *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997).

Both grounds relied upon by the courts below present issues that should be considered by this Court.

The Original Prosecution and Direct Appeal

Defendant and Petitioner David M. Dale originally was charged in January 1990, together with four co-defendants—three individuals and a corporation named Automated Data Management, Inc. (hereinafter "ADM")—under a 10-count federal indictment alleging violations of 18 U.S.C. §§ 371, 1001, & 1343, and 26 U.S.C. §§ 7201 & 7206 (A1-34).[2] The focus of the indictment was

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[2] Citations to "A-" are to pages of the Appendix to the Brief for Appellant in the court of appeals. As the defendants were charged with criminal violations of federal statutes, jurisdiction in the court

on alleged tax fraud involving the federal income tax liabilities of ADM, of which the individual defendants were officers and directors. Six of the ten counts of the original indictment were alleged under statutes containing an express element of materiality— four under 18 U.S.C. § 1001 and two under 26 U.S.C. § 7206.

Under the then-settled law, such elements of materiality were considered to present questions of law for determination by the court rather than the jury. *See, e.g., United States v. Hansen,* 772 F.2d 940 (D.C. Cir. 1985), *cert. denied,* 475 U.S. 1045 (1986). On the basis of that prevailing law, the defendants made a pre-trial motion to dismiss the four 18 U.S.C. § 1001 counts—all relating to disclosure questionnaires filed with the Department of Defense—on the grounds that the alleged false statements were immaterial as a matter of law, given that the Defense Department's inquiries were based in national security concerns, which were not implicated by the alleged omissions.[3] By a pre-trial ruling, the district court denied the motion to dismiss. (Order, filed on May 31, 1990). In a memorandum later published to explain the rationale for that pretrial order, the district court also made a finding of the contrary conclusion--that the alleged false statements or omissions *were* material as a matter of law, thus withdrawing that entire issue from consideration on the evidence upon the trial. *United States v. Dale,* 782 F. Supp. 615, 625-26 (D.D.C.

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of first instance was based upon 18 U.S.C. § 3231.

[3] As is detailed in the previous opinions of the district court and the court of appeals in the original instance, the contested omissions in the Defense Department filings concerned ownership interests held by the defendants in Hong Kong companies that were affiliates of ADM and wholly-owned by United States citizens associated with ADM. As no foreign government or national had any interest in these companies, the defendants argued that their omission from the filings could have no national security implication, and therefore were not material to the Department of Defense's concerns in obtaining the disclosure questionnaires, as a matter of both fact and law.

1991); *id.* at 626 ("[T]he Court finds that the alleged false statements are material as a matter of law").

Nevertheless, at the close of the evidence at trial, the defendants moved for a judgment of acquittal on the § 1001 counts, reasserting their defense on materiality, which was again denied.[4] At the charging conference before the district court, the defense did concede--as was the then-settled law--that materiality was a question for the court (Trial Tr. 3878-79). However, the defendants objected to the instruction given to the jury--that the court had found the matters in question to be material, on all of the affected counts--on the ground that this was the equivalent of directing a verdict for the government on a element of the offense (*see* Trial Tr. 3923). Over this objection, the jury was so instructed (*see* A82-83). The jury returned a verdict of conviction on all charged counts, against all defendants, on July 23, 1990.

On direct appeal to the D.C. Circuit during 1992, the defendants continued to attack the legal grounds for the government's case on materiality. In its published 1993 opinion on the direct appeal, the court of appeals addressed and rejected that point on the

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[4] By a memorandum order dated July 11, 1991, denying this motion, the district court noted that "[d]efendants unsuccessfully raised this argument in a pretrial motion," and "[t]o the extent that defendants have set forth the same legal argument here as in the pretrial motion, the Court will deny the motion." In addition, the district court addressed the defendants' further argument that "the evidence at trial was inadequate to demonstrate the materiality of the facts at issue beyond a reasonable doubt" (*id.*), because the government's evidence at trial tended to show that the allegedly material misstatements actually had no effect whatsoever on the Defense Department's actions (*see id.*). That point was rejected by the district court on the ground that it was "premised on a misunderstanding of the materiality requirement," which "does not require an assessment of how the statement at issue actually affected the agency," but rather refers to the "abstract capability" of the statement or omission in question (*id.*).

merits, again under the then-settled view that materiality was a question of law for the court. *See United States v. Dale*, 991 F.2d 819, 834 (D.C. Cir.), *cert. denied*, 510 U.S. 1030 (1993). The court of appeals affirmed all defendants' convictions on all counts, but remanded the case to the district court with instructions to revise the defendants' sentences to eliminate multiplicity between related tax fraud and tax evasion counts, *see* 991 F.2d at 859.[5] Ultimately, the Petitioner was re-sentenced in September 1994 under six counts of conviction: three under 18 U.S.C. § 1001; and one each under 18 U.S.C. § 371, 18 U.S.C. § 1343, and 26 U.S.C. § 7206.[6] Pursuant to that sentencing, Mr. Dale paid fines and other monetary penalties, was incarcerated for three years, and today remains under a sentence of supervised release running until October 1999 (*see* A108-15).

Gaudin and the Section 2255 Proceedings

In June 1995, this Court handed down its decision in *Gaudin*, which reversed the previously-settled law by holding that elements of materiality in federal false-statement offenses were not issues of law to be decided by the court, but rather were issues to be decided by the jury in a federal jury trial.

On February 8, 1996, Mr. Dale moved under 28 U.S.C. § 2255 for relief from his convictions and sentences (A116), on the

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[5] In the meantime, this Court denied certiorari on direct review on December 13, 1993 (No. 93-412).

[6] Four of the six counts involved explicit statutory elements of materiality, and the other two were intertwined with those in the district court's instructions to the jury. In the courts below, the government conceded the vulnerability of the three § 1001 counts to *Gaudin* error, but contested whether the other three counts were affected. Neither the district court nor the court of appeals reached that issue. Both based their rulings on the § 1001 counts.

basis of *Gaudin*.[7] That motion was denied by the district court on February 13, 1997, entirely on the basis of the anti-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989), for state prisoner petitions, which the district court ruled should be extended to federal prisoner motions (*see* a14-22). Mr. Dale appealed the 2255 ruling to the D.C. Circuit on February 21, 1997. After being stayed for several months pending this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997) (regarding the inapplicability of the 1996 amendments to § 2255 to previously-filed motions), the case was briefed and argued during November 1997 through March 1998. Given the basis for the district court's decision, the parties' briefing focused primarily upon the *Teague* issues, which were not addressed by the majority panel opinion ultimately issued.

The Court of Appeals' Decision

On April 14, 1998, a the panel of the court of appeals (Judges Wald, Silberman, and Henderson)[8] affirmed the district court's denial of the 2255 motion, but on the differing grounds of the *Frady* doctrine, on a ruling that the *Gaudin* errors in this case would not satisfy the "actual prejudice" element of *Frady* (*see* a4-6), even if "cause" were satisfied (*see id.* at 5n.4).[9]

The central aspect of the court of appeals' reasoning was the importation into Section 2255 review of this Court's May 1997

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[7] The district court's jurisdiction is provided by 28 U.S.C. § 2255, and the fact that it was the court of original conviction and sentencing.

[8] The majority opinion for the panel originally was signed by Judge Henderson, but later amended by an order of April 24 (a13) to a per curiam opinion.

[9] In a separate concurring opinion (a8-12), Judge Henderson also would have reached the *Teague* analysis relied upon by the district court, and affirmed on that basis as well.

decision in *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997), which analyzed *Gaudin* errors under the "plain error" standards of Rule 52(b) of the Federal Rules of Criminal Procedure, as are applicable to unpreserved error on direct appeal. Under that reasoning, an error does not produce "actual prejudice" within the meaning of the *Frady* doctrine--even if there were adequate "cause" for a procedural default[10]--unless it first passes all four components of the test defined in *United States v. Olano*, 507 U.S. 725 (1993), and applied in *Johnson*, most notably the fourth prong of the *Olano* test that the error--even if plain and affecting substantial rights--also must "seriously affect the fairness, integrity or public reputation of judicial proceedings," *Johnson*, 117 S. Ct. at 1550 (*see* a5-6).

In a separate concurring opinion in the court of appeals, Judge Henderson also would have reached the *Teague* question, and affirmed on that basis in the alternative (a8-12).

On May 29, 1998, Mr. Dale moved for rehearing in the court of appeals, with a suggestion for rehearing *in banc* grounded upon the intra-Circuit and inter-Circuit conflicts created by the panel's opinion, and the inconsistency of the panel's opinion with this Court's decisions in *Frady* and its progeny. On June 18, 1998, rehearing and rehearing *in banc* were denied (a23).

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[10] Though we do not raise the question on this Petition, we note in passing that it is by no means clear that the court of appeals properly analyzed this case as involving "procedural default." As we have described above, trial counsel for Mr. Dale did anticipate the *Gaudin* principle in part, by objecting to the district court's instruction to the jury that materiality element had been directed against the defendants. However, counsel did not insist upon an instruction that permitted the jury itself to determine that element, as *Gaudin* later held. The court of appeals' analysis assumes that, if this is a procedural default, it was one for which there was adequate "cause" within the meaning of the *Frady* doctrine.

REASONS FOR ALLOWING THE WRIT

This Petition presents two important questions concerning the protection of the right to trial by jury and the scope of collateral review available to federal prisoners under 28 U.S.C. § 2255. While the immediate focus of the case on the treatment of *Gaudin* errors under the *Frady* and *Teague* cases is important in itself, the questions presented have broader implications for the proper relationship between direct and collateral review of both state and federal criminal prosecutions, and therefore potentially affect the entire range of criminal jurisprudence supervised by this Court.

I. This Court Should Settle the Circuit Conflicts Concerning the Application of *Frady* to *Gaudin* Errors.

The first question presented by this Petition comprises two subsidiary questions, both of which have created conflicts among the lower federal courts: (a) whether *Gaudin* error should be considered "structural" or "per se" error within the meaning of *Sullivan v. Louisiana*, 508 U.S. 275 (1993), such that harmless-error analysis is inapplicable; and (b) whether collateral review of *Gaudin* error under *Frady* differs from the "plain error" test applied to direct review in *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997).

A. *Gaudin* and Structural Error

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held: (1) that a defective reasonable doubt instruction violated the Fifth and Sixth Amendments; and (2) that such an error can never be harmless, but falls into the category of "structural" error that automatically invalidates a conviction. *See also Arizona v. Fulminante*, 499 U.S. 279 (1991); *Yates v. Evatt*, 500 U.S. 391 (1991). In this situation, no amount of evidentiary support may render the error harmless, because "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal," 508 U.S. at 280, and because the jury guarantee is a "basic protection whose precise effects are unmeasurable, but without which a criminal

trial cannot reliably serve its function," *Sullivan*, at 281.

This Court's 1995 *Gaudin* decision relied in part upon *Sullivan* to hold that the Fifth and Sixth Amendments "require criminal convictions to rest upon a *jury determination* that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt," *United States v. Gaudin*, 515 U.S. 506, 510 (1995)(emphasis added), and further held that this requirement applies to the failure to submit materiality elements for jury determination, specifically in the context of a federal prosecution under 18 U.S.C. § 1001. However, the Court in *Gaudin* did not address the question whether the error involved there was subject to harmless-error analysis, *see Gaudin*, 510 U.S. at 523, 526-27 (Rehnquist, C.J., concurring).

Since *Gaudin* was decided, the courts of appeals have become deeply divided on the question whether *Gaudin*, like *Sullivan*, involves a "structural" or per se error that is not subject to harmless-error analysis, either on direct appeal or on collateral attack, for the purpose of supplying a finding that the jury did not make.[11] The First, Fourth, Fifth, Seventh, and Tenth Circuits have held that *Gaudin* error is structural,[12] while the Second, Third, Sixth, Eighth, and Eleventh Circuits have held that *Gaudin* error is subject to

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[11] This case does not present a situation in which a missing jury finding on an element can be supplied by an unaffected jury verdict on another count, *compare California v. Roy*, — U.S. —, 117 S. Ct. 337 (1996)(per curiam); *see also id.* at 339 (Scalia, J. concurring, joined by Ginsburg, J.) (*Sullivan* and *Gaudin* together require an actual jury finding on every essential element); *United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997).

[12] *United States v. DiRico*, 78 F.3d 732 (1st Cir. 1996); *United States v. David*, 83 F.3d 638 (4th Cir. 1996); *United States v. Shunk*, 113 F.3d 31 (5th Cir. 1997); *Waldemer v. United States*, 106 F.3d 729 (7th Cir. 1997); *United States v. Wiles*, 102 F.3d 1043 (10th Cir. 1996).

harmless-error analysis,[13] and the Ninth Circuit's position remains ambiguous.[14] The D.C. Circuit has held both ways, and thus has an internal conflict: in *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997), one panel held that *Gaudin*-type error was structural; while the decision below in this case, by another panel of the same Circuit, held that *Gaudin* error was subject to harmless-error analysis (a5-6).

Two Terms ago, this Court recognized the issue but avoided a decision in *Johnson v. United States*, — U.S. — , 117 S. Ct. 1544 (1997). That case involved direct review of a *Gaudin* error under the "plain error" standards of Rule 52(b) of the Federal Rules of Criminal Procedure, under the four-pronged test developed in the Court's previous decision in *United States v. Olano*, 507 U.S. 725 (1993). In *Johnson*, the Court recognized that the third prong of the *Olano* test— that the error is one "affecting substantial rights"— could be influenced by the classification of *Gaudin* error as structural *vel non*, *see Johnson*, 117 S. Ct. at 1549-50, an issue that the Court's opinion viewed as "by no means clear," *id.* at 1550. However, the Court concluded that "we need not decide that question," *id.*, because the fourth prong of the *Olano* test was not met in that case.

The Court's decision in *Johnson* appears to have deepened the conflict among the Circuits on the question of classifying *Gaudin* under the structural versus harmless-error dichotomy, with some courts— including the court of appeals' opinion below in this case—

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[13] *Bilzerian v. United States*, 127 F.3d 237 (2d Cir. 1997); *United States v. West Indies Transport Co.*, 127 F.3d 299 (3d Cir. 1998); *United States v. Rogers*, 118 F.3d 466 (6th Cir. 1997); *United States v. Dedhia*, 134 F.3d 802 (6th Cir 1998); *United States v. Raether*, 82 F.3d 192 (8th Cir. 1996); *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998).

[14] *Compare United States v. Knapp*, 120 F.3d 928 (9th Cir.), *cert. denied*, 118 S. Ct. 417 (1997), *with Harmon v. Marshall*, 69 F.3d 963 (9th Cir. 1995).

reading *Johnson* as suggesting that *Gaudin* error is not structural (*see* a5),[15] while other courts have held that the question is unaffected by *Johnson*.[16]

The intra-Circuit conflict within the D.C. Circuit illustrates the broad potential of this uncertainty as affecting a vast number of cases. While the decision below in this case involves a direct application of *Gaudin* to the omission of a materiality element under 18 U.S.C. § 1001, the conflicting decision in *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997), involved the omission of the "enterprise" element from the jury charge on a RICO offense, which the court held to be structural error, on the authority of *Sullivan* and *Gaudin*, and further held that the analysis was unaffected by *Johnson*:

> "The district court's failure to allow the jury to decide the enterprise element was, per se, a reversible error. See Gaudin, 515 U.S. at 510-11; . . . Sullivan, 508 U.S. at 280-83 . . . . The government's reliance on Johnson v. United States . . . as somehow undermining the application of Sullivan's per se prejudicial error rule to a Gaudin error is misplaced. The Court in Johnson engaged in a plain error analysis because the appellant had failed to make an objection to the instruction at trial. It did not decide whether Gaudin errors were per se prejudicial errors that affected a defendant's substantial rights, or rather were subject to a

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[15] Similar suggestions are made in *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998), *United States v. Dedhia*, 134 F.3d 802 (6th Cir 1998), and *United States v. Gassaway*, 966 F. Supp. 1054 (W.D. Okl. 1997)(commenting on the contrary Tenth Circuit rule).

[16] *See United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997); *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998); *United States v. Wilkinson*, 137 F. 3d 214 (4th Cir. 1998).

harmless error analysis."

DeFries, 129 F.3d at 1312n.13 (citations omitted).

The decision avoided in *Johnson* now should be made. The conflict among the Circuits is fully developed, and even balanced. The question has broad importance across a range of cases on both direct and collateral review, potentially in any criminal case where an essential element has been withdrawn from jury consideration.

B. Structural Error, Plain Error, and the *Frady* Standard

Johnson was a direct review case, applying the "plain error" standards under Rule 52(b) of the Federal Rules of Criminal Procedure as developed in *Olano*. Under that test, as apparently interpreted in *Johnson*, even structural error not raised below may be disregarded on direct review unless it also satisfies the fourth prong of the *Olano* test in that it "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Johnson*, 117 S. Ct. at 1550. While many questions might be raised concerning the meaning of that formulation where applicable, the question raised by this Petition is whether that test can be applied as a definition of "actual prejudice" under the cause-and-prejudice standard of *United States v. Frady*, 456 U.S. 152 (1981) and its progeny, as apparently was held by the court of appeals in this case (a4-6).

The ruling below by the court of appeals is in direct conflict with a contrary ruling by the Seventh Circuit in *Waldemer v. United States*, 106 F.3d 729 (7th Cir. 1997), and thus presents a second inter-Circuit conflict. More fundamentally, however, the ruling below—and similar rulings by other lower federal courts—are in conflict with this Court's decisions under the *Frady* doctrine.

The conflict appears from the seminal *Frady* case itself. In that decision, this Court confirmed that "actual prejudice" would be satisfied by a showing that the error in question "amounts to prejudice per se," 456 U.S. at 170, or, in other words, that structural error

would satisfy "actual prejudice" test, as was held in the context of *Gaudin* error by the Seventh Circuit in *Waldemer*. Furthermore, one of the precise holdings of *Frady* was that the plain error doctrine was not applicable on collateral review under 28 U.S.C. § 2255, *see* 456 U.S. at 162-69. While both the plain error and *Frady* doctrines have evolved since that time, we are unaware of any decision by this Court holding or even suggesting that the two doctrines have converged. Certainly, *Johnson* does not purport to be such a decision, as the court of appeals apparently held in this case (a5). And if there is to be a conflation of "plain error" with the cause-and-prejudice doctrine, it should come from this Court, as it requires the overruling of *Frady* and other prior decisions by this Court.

We recognize that the court of appeals' rationale here can be supported by language both from *Frady* and other decisions of this Court—notably *Henderson v. Kibbe*, 431 U.S. 145 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Murray v. Carrier*, 477 U.S. 478 (1986)—suggesting that collateral attack should impose a higher burden on the defendant than direct review, including the plain error doctrine. However, all of those cases were decided before the plain error doctrine took its current form in *Olano*. Moreover, at that level of generality, the court of appeals' rationale, though superficially appealing, is inconsistent with subsequent decisions of this Court developing the *Frady* doctrine, down to and including this year's decision in *Bousley v. United States*, — U.S. — , 118 S. Ct.1604 (1998), and, upon analysis, is revealed to be incorrect and unwise, because it fails to take account of the important functional differences between direct and collateral review.

Collateral review is not a substitute for appeal, or simply a further appeal. The two procedures have different purposes and objectives, and accordingly encompass a different range of issues and should be judged by different standards. To take only one obvious example, newly discovered evidence is a common ground for collateral review, but is almost never considered on direct appeal. Thus, however superficially attractive the idea may be, it simply is not true that collateral review necessarily a "higher" standard; nor should it be true. Collateral review involves different standards devised for a different functions. To import the alien standard of

plain error review on direct appeal, or, as is suggested by the court of appeals decision here, some undefined "higher" standard, would be to destroy the refinements introduced by the development of the collateral review doctrines over the years.

In the case of the *Frady* doctrine, such a transformation essentially would eliminate the "cause" half of the doctrine, by raising the "prejudice" standard to something that is equal to or greater than a "miscarriage of justice," *see Johnson*, 117 S. Ct. at 1550, which is equivalent to the existing *Frady* doctrine for cases in which no "cause" has been shown, *see Bousley v. United States*, 118 S. Ct. 1604 (1998); *Schlup v. Delo*, 513 U.S. 298 (1995); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986). But the "cause" inquiry serves the important purpose of distinguishing between matters that should have been litigated in the original instance and matters that reasonably were not. If the law does not make that distinction meaningful, then *Frady* will not accomplish its purpose of discouraging unnecessary litigation in the first instance by providing some relief when unanticipated events--such as the dramatic change of law involved in this case--do occur. In any case, if *Frady*'s policy of balance in finality is to be changed, then it should be changed by the considered decision of this Court.

II. This Court Should Decide Whether the Anti-Retroactivity Doctrine of *Teague v. Lane* Should Be Extended to Collateral Review Sought By Federal Prisoners.

The second question presented by this Petition does not involve conflicts among the Circuits, but does present an important question that should be decided by this Court, both because of its practical significance to the daily operations of the federal criminal justice system and because of its profound implications for our constitutional structure.

That question is whether the anti-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989) for application to collateral review of state prisoner petitions should be extended to

28 U.S.C. § 2255 motions by federal prisoners. *Teague* does not purport to address that question, and no other decision of this Court does so, though the recent decision in *Bousley v. United States*, — U.S. — , 118 S. Ct. 1604 (1998), appears to assume *Teague*'s applicability to federal prisoner motions, *see* 118 S. Ct. at 1609-10.

In the lower federal courts, there also are a number of decisions that appear to assume *Teague*'s applicability to federal prisoner motions,[17] but, aside from Judge Henderson's concurring opinion below (a8-12),[18] there are only two reasoned court of appeals' opinions on the point: the Second Circuit's decision in *Gilberti v. United States*, 917 F.2d 92 (2d Cir. 1990), and the Seventh Circuit's decision in *Van Daalwyk v. United States*, 21 F.3d 179 (7th Cir. 1994). Both opinions state essentially the same rationale: whereas *Teague* itself rested on the twin pillars of both federal-state comity and "finality" considerations, *see Teague*, 489 U.S. at 308, *Van Daalwyk* and *Gilberti* imply that "finality" alone--unaccompanied by federal-state comity--can support the application of *Teague* under § 2255. However, neither of those cases, nor any other case of which are aware, addresses any of the several problems of law and policy that would be created by the extension of *Teague* to the federal-prisoner context.

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[17] *See United States v. Swindall*, 107 F.3d 831, 834n.4 (11th Cir. 1997)(noting this fact and collecting citations); *United States v. Ayala*, 894 F.2d 425 (D.C. Cir. 1990); 2 J. Liebman & R. Hertz, *Federal Habeas Corpus Practice and Procedure* § 25.6nn.15-19 & accompanying text (2d ed. 1994 & Supp. 1996)

[18] In this case, the district court's decision denying the Petitioner's § 2255 motion rested exclusively upon *Teague* (a14-22). On appeal, though *Teague* was the principal point briefed and argued by the parties, two of the three members of the panel rested the affirmance exclusively upon *Frady*, without reaching *Teague* (a1-7). Only Judge Henderson would have affirmed on both grounds (a8-12).

First, dispensing with the federalism as a basis for the application of *Teague* calls into question whether there is any constitutional basis for the decision. *Teague* itself, and as confined to state prisoners, can be justified as Fourteenth Amendment case reflecting the comity interests as between dual federal and state sovereignty under our constitutional system. Indeed, much of the content of the *Teague* doctrine, and especially its exceptions to the general rule of non-retroactivity in collateral review, harkens back to an earlier era of Fourteenth Amendment jurisprudence represented by *Palko v. Connecticut*, 302 U.S. 319 (1937) and similar cases, since overruled by the selective-incorporation cases of the 1960's, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (4th Amendment); *Robinson v. California*, 370 U.S. 660 (1963) (8th Amendment); *Gideon v. Wainwright*, 372 U.S. 335 (1965) (6th Amendment right to counsel); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (6th Amendment right to trial by jury).[19] However, once *Teague* is extended into the federal-prisoner context, the Fourteenth Amendment can no longer stand between the individual's rights and the government's responsibilities. Stated another way: what part of the Constitution elevates "finality" above the Bill of Rights?

This is not to say that one might not fashion a constitutionalized doctrine of res judicata for federal criminal prosecutions that excludes intervening changes in law, perhaps from Article III or the Due Process Clause, but we are aware of no decisions that do so.

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[19] The principal source for the *Teague* standards was a series of earlier dissenting and concurring opinions by Justice Harlan from the "selective incorporation" era, *see Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), and *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part on the judgments), which essentially were a counter-strategy to the then-expansionary nature of the Court's criminal procedure jurisprudence. Indeed, the entire concept of non-retroactivity of any aspect of this Court's decisions appears to date only from *Linkletter v. Walker*, 381 U.S. 618 (1965).

Second, and aside from the constitutional difficulty, the extension of *Teague* to federal-prisoner motions under 28 U.S.C. § 2255 creates a problem of construing that statute, particularly given the continuing authority of this Court's decision in *Davis v. United States*, 417 U.S. 333 (1974). In *Davis*, this Court held that an intervening change in federal substantive law was cognizable under § 2255, and thus fully retroactive. If both *Teague* and *Davis* are to co-exist in federal prisoner cases, this introduces the complication of distinguishing the non-retroactive scope of *Teague*, stated as rules of "constitutional criminal procedure" from rules of "federal substantive law." Aside from the complexity of this approach, which appears to have been followed both in the lower courts and by this Court's recent *Bousley* decision, *see* 118 S. Ct. at 1609-10, is the difficulty of reconciling the approach with the statutory language of § 2255, which refers to "Constitution" and "laws of the United States" in pari materia, and was so construed by this Court in *Davis*, 417 U.S. at 344-45, which antedated *Teague*.

Third, the application of *Teague* under 28 U.S.C. § 2255 is difficult to reconcile with the more general law of finality or the function of that statute in particular. Unlike the availability of federal habeas corpus for state prisoners, § 2255 serves a role within the federal criminal procedure system that is analogous to the Rule 60(b) of the Federal Rules of Civil Procedure under the federal civil system. A § 2255 motion is not a "collateral" attack in the sense of asking one court to overturn or nullify the effects of another court's judgment; it seeks relief from the rendering court, in the same manner as Civil Rule 60(b). Thus, extending *Teague* as a bar to § 2255 would reverse the ordinary sequence of finality analysis, and create the anomalous result of conferring more finality on criminal than on civil judgments.

This is illustrated by comparing this Court's recent decision in *Agostini v. Felton*, — U.S. — , 117 S. Ct. 1997 (1997), which granted relief under Civil Rule 60(b)(5) from a 12-year-old permanent federal injunction barring a public school district from sending its teachers into parochial schools, in light of intervening changes in First Amendment law. In granting that relief on "collateral attack," this

Court applied a well-established line of authority permitting relief from judgments imposing continuing obligations, where there had been "a significant change either in factual conditions or in law," *Agostini,* 117 S. Ct. at 2006. In reaching that conclusion, the Court cited *Davis* in support, and pointedly distinguished *Teague* as "applying a more stringent standard for recognizing changes in law and 'new rules' in light of the 'interests of comity' present in federal habeas corpus proceedings," *Agostini,* 117 S Ct. at 2018.

Finally, it is by no means clear that applying both *Frady* and *Teague* to federal prisoner motions under § 2255 serves any rational purpose of any kind, much less one that would justify the complications introduced by *Teague*. *Frady* itself is based upon and vindicates a policy of finality in federal criminal judgments. By definition, any change of law cognizable under *Frady* would be one that was both reasonably omitted from the original litigation ("cause") and significant to liability ("prejudice"). Thus, the only incremental effect of *Teague* in this context would to bar the correction of errors whose recognition would promote both efficiency and fairness—a result that does not commend itself as sound policy.

While we have delved into the merits somewhat in presenting this question, we believe that it is important to the exercise of the Court's discretion that none of the foregoing points have been addressed by any reported decision of which we are aware, notwithstanding the relatively common application of *Teague* to federal prisoner motions in the lower federal courts. We suggest that this question deserves far more serious consideration than it has received to date, and should be taken up for review by this Court.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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